IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

February Term, 1923

3917

JERRY SIMPSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLEE

A. G. SHOUP,
United States Attorney.

H. D. STABLER,
Special Assistant
United States Attorney,
on Brief.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

February Term, 1923

3917

JERRY SIMPSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLEE

A. G. Shoup,
United States Attorney.

H. D. Stabler,
Special Assistant
United States Attorney,
on Brief.

ARGUMENT

1. THE ALASKA BONE DRY ACT WAS NOT REPEALED BY THE NATIONAL PROHIBITION ACT.

The statement by counsel for Plaintiff in Error, hereinafter designated as appellant that (p 5 Brief) "The effect of the provisions of the Eighteenth Amendment upon the Alaska Act was not presented in that (Abbate) case, or passed upon by the court" is not correct, for in the case of *Abbate v. U. S.* 270 *Fed.* at page 737 this court says:

"In brief, we think that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and the National Prohibition Act, although in force in all jurisdictions, AFFECTS no more the Alaskan act than it does the state acts."

This Court affirmed the decision in the Abbate case in the case of *Koppitz v. U. S.* 272 *Fed.* 96. Hunt, C. J. speaking for the court says at page 99:

"The contention of defendant that the complaint on its face is invalid, because it charged

that the offense was committed on May 31, 1920, and that the Alaska Bone Dry Law was impliedly repealed by the Eighteenth Amendment and the National Prohibition Act (41 U. S. Stat. (1919) p. 305) is not well founded, for this court ruled to the contrary in Abbate v United States, 270 Fed. 735."

It follows that the District Court properly overruled the demurrer to the complaint upon the authority of the foregoing cases.

2. THE SEARCH OF APPELLANT'S PREMISES WAS LAWFUL AND THE EVIDENCE OBTAINED WAS LAWFUL, BECAUSE:

(a) The officers were acting under a valid search warrant.

(b) No search warrant was necessary—the search and seizure of intoxicating liquors was based upon a crime committed in the presence of the officers.

(a) THE OFFICERS WERE ACTING UNDER A VALID SERCH WARRANT.

Appellant alleges that the affidavit upon which the search warrant in this case is based does not state facts sufficient to show probable cause, and therefore the search was illegal and in violation of appellant's constitutional rights. The affidavit, so far as pertains to the allegations of

fact showing or tending to show probable cause, is in the following language (pp 4, 5, 6 transcript):

"And this deponent further says that on the fifth day of January, 1922, he watched the premises hereinafter described and occupied by Jim Simpson and Jerry Simpson, and saw intoxicated men enter and leave said premises; that said deponent saw intoxicated men in said hereinafter described premises and saw men deport themselves as under the influence of intoxication."

Then follows a description of the premises to be searched as a two story frame building at Ketchikan, Alaska,

"known as and designated as the Northern Hotel and Bar, and in the lower story or floor thereof and particularly that portion thereof known and designated as the Dory."

Counsel contend that because affiant "saw intoxicated men enter" the premises, there is no inference that intoxicating liquor was possessed, sold, kept, given away, or otherwise furnished, on the premises. But the premises to be searched are described in said affidavit as the "Northern Hotel and Bar and that portion thereof known and designated as the Dory," and the inference therefrom may fairly be drawn that said North-

ern Hotel and Bar and 'Dory' is a public place where intoxicated persons resort and congregate together for the purpose of drinking intoxicating liquors. Further, the deponent stated that he saw intoxicated men in said premises and saw men deport themselves therein as under the influence of intoxication, and the inference can be fairly drawn that these men were others than those he saw entering the premises. The inference arrived at by the magistrate from the facts stated was properly drawn. The facts stated were positive, and sufficient to justify a finding of probable cause.

The case of *Woods v. U. S.* 279 *Fed.* 706, cited by appellant, has no application or bearing upon the case at bar. In the Woods case the search warrant, and affidavit upon which it was obtained, were held defective because based upon information and belief, and did not particularly describe the persons or things to be seized. There were no facts stated. And further the search warrant proceedings were based upon a different statute and in different proceedings from the case at bar.

The case of *U. S. v. Boasberg,* 283 *Fed.* 305, cited by appellant, is not in point for the reasons hereinafter pointed out.

The case of *Giles v. U. S.* 284 *Fed.* 208, cited by appellant, is not in point. In the Giles case the

affidavit did not state any facts upon which the magistrate could base a finding of probable cause. The warrant was held bad for other reasons. A casual reading of the Giles case will disclose the vice in appellant's reasoning.

Appellant contends that the information upon which the so-called second search warant in this case was obtained was discovered while the officers were executing a first search warrant upon adjoining premises, and that the case of *U. S. v. Boasburg,* 283 *Fed.* 305, is exactly in point and controlling.

The record shows that appellant's conclusion in this respect is erroneous. The evidence shows (pp. 16, 17 and 18 transcript) that the so-called first and second search warrants were executed on the same day, to wit, January 7, 1922. The so-called second search warant bears date of January 7, 1922, as does the affidavit upon which said search warrant is based. The affidavit for the second search warrant, the one in question, (p. 4 transcript) shows that the facts, upon which are based probable cause, occurred January 5th, 1922, two days prior to the search on either the first or second warrant. It appears, therefore, that the facts stated in obtaining the second search warrant were NOT discovered upon the execution of the first search warrant. It could not be a fact, therefore, that all, or any, of the evidence was obtained by officers of the United

States "AFTER THEY HAD GAINED POSSESSION AND CONTROL OF THIS DEFENDANT'S PREMISES WHILE ACTING UNDER THE SO-CALLED FIRST SEARCH WARRANT," as alleged by appellant in his petition for suppression of evidence, and as alleged in his brief (p. 9 Brief).

But even if the officers had learned the facts upon which the second search warrant was based while searching adjoining premises it would not render the search warrant in this case unlawful or void. The search as disclosed by the evidence in this case was not in violation of appellant's constitutional rights.

The evidence shows that the Northern Hotel and Bar, called the "Dory" was a public place, (p. 50 Transcript) to wit, a so-called soft drink parlor. In this place appellant conducted a licensed business (p. 16 Transcript). He had a lunch counter (pp. 31 and 93 Transcript) and a bar (p. 25 Transcript) for dispensing soft drinks. The place also contained billiard and card tables for the use of patrons who chose to visit the appellant's place of business. The officers had been there before the seventh day of January, and being open to the public they had a right to visit such place. They were not trespassers there in any sense of the word; and it is not material whether they remained on, or departed from, the premises during the time it took them

to get a second search warrant to continue their search, or whether they secured the information upon which the search warrant was based while so on the premises.

The case of *U. S. v. Boasberg,* 283 *Fed.* 305 which appellant says is exactly in point, does not apply to the facts of this case at all. In the Boasberg case officers searched a PRIVATE DWELLING OCCUPIED AS SUCH under a search warrant based upon facts discovered while searching adjoining premises. The officers were trespassers when they entered this private dwelling, and they had no legal right to remain therein until they could obtain a second search warrant to continue their search into such private dwelling; and they had no legal right to use evidence obtained after such unlawful entry. There is no similarity whatever between the Boasberg case and the case at bar in point with appellant's reasoning. But even though the search warrant in the case at bar was invalid for the reasons stated in appellant's brief, the search and seizure was lawful, because:

(b) NO SEARCH WARRANT WAS NECESSARY TO SEARCH THESE PREMISES. The crime of possessing intoxicating liquor was committed by this appellant in the presence of the officers. Section 2399 Compiled Laws of Alaska provides: "A peace officer may, without a warrant, arrest a person, for a crime committed or

attempted in his presence." Deputy United States Marshal Fred E. Handy testified (bottom of p. 53 Transcript) as follows:

Q. "What was your purpose in going back?"

A. "My purpose was to wait for the tide to go out and get some beer that had been dropped from a trap or trip that I tripped myself. I unlocked it, in unlocking the door, I pulled the trip and let it fall down on the flats or in the bay, and the tide was in and I wanted to wait until the tide got out. When the tide went out, I wanted to get whatever it was on the beach."

It appears by the evidence that this officer, who was directing the search under the warrant, entered a public place. In other words the officer was lawfully upon the premises. It appears by this evidence that he was made conscious of the fact that the appellant unlawfully had intoxicating liquor, to wit, beer, in his possession in such place because the officer says in effect that when he entered this place he opened a trip or trap, a familiar device to prohibition enforcement officers, and that some beer dropped therefrom into the water under the building. This beer must have been in plain sight of the officer while he was lawfully upon the premises. The Alaska Bone Dry Act, section 1, defines beer as intoxicating liquor. Under said Act the appellant could not lawfully have beer in his pos-

session for any purpose. The crime of unlawfully possessing intoxicating liquor was committed in the presence of the officer and he had a legal right to arrest the appellant and to seize the liquor and search these premises without a warrant. In the case of *Dillon v. U. S.* 279 *Fed.* 646 (CCA 2) the court says: "It may be conceded that a government agent has no right to enter a private house to search for liquors without a search warrant. But in this case they did nothing of the kind. They entered a public bar of a hotel, where people were free to come and free to go. The officers had the same right to enter that the public had."

In the case of *O'Connor v. U. S.* (*D. C.*) 281 *Fed.* 396, at page 399 District Judge Rellstab says:

> "Having lawfully entered, and being made conscious, through sight and smell, of the possession of the liquors, and noting conditions evidencing that the liquors were kept in violation of the National Prohibition Act, they had the legal right to seize them without first securing a search warrant." (Citing) *U. S. v. Borkowski* (*D. C.*) 268 *Fed.* 408; *Kathriner v. U. S.* (*C. C. A.* 9) 276 *Fed.* 808; *U. S. v. Bateman* (*D. C.*) 278 *Fed.* 231; *U. S. v. Snyder,* (*D. C.*) 278 *Fed.* 650; in re *Mobile* (*D. C.*) 278 *Fed.* 949."

In the case of *Vachina v. U. S.* 283 *Fed.* 35,

Circuit Judge Gilbert speaking for this court says:

> "The prohibition enforcement agents testified that the place of business of the plaintiff in error consisted of a soft drink barroom, adjoining which was a large dining room, in the rear of which was a kitchen. That on December 29, 1920, they entered the kitchen, and while one of them handed to the plaintiff in error a search warrant, the other discovered and took possession of a bottle and a demijohn, which were in plain sight on the floor beneath a table. There was proof that the bottle contained brandy and the demijohn contained wine, the alcoholic strength of which was more than 1 per cent, and that they were fit for beverage. We do not deem it necessary to enter into a discussion of the question whether or not the affiidavit was sufficient to justify the issuance of a search warrant. While the officers on entering the premises which were the defendant's place of business had a search warrant, the intoxicating liquor which was seized was in plain sight, was unlawfully in the possession of the plaintiff in error, and his possession thereof constituted an offense in violation of the National Prohibition Act. Although one of the officers handed a search warrant to the plaintiff in

> error while the other simultaneously took possession of the liquor, the search warrant was unnecessary. The plaintiff in error was engaged in the actual commission of an offense denounced by the law, in that he had possession of intoxicating liquor in his place of business."

Circuit Judge Ross, speaking for this court in the case of Kathriner v. U. S. 276 Fed. 809, in a situation at a public soft drink bar similar to that in this case said:

"Under the circumstances of the case, as disclosed by the evidence, a search warrant was not necessary."

See also *Driskill v. U. S.* 281 *Fed.* 146 (CCA 9).

In the case of the *United States v. Camarota et al,* 278 *Fed.* 388, (D. C.) Trippet, District Judge says:

> "The officer, having entered upon the premises without having committed a trespass, and thus being lawfully there, and seeing a crime being committed, had a perfect right, and it was his plain duty, to seize the articles which were being used in committing the crime. In making such seizure, the officer could not do so by virtue of the search warrant, but in the performance of his general duty to prevent the commission of

crime. *United States v. Fenton* (D. C.) 268 *Fed.* 221, *Ex parte Morrill* (CC) 35 *Fed.* 261; 20 *Stat. at Large,* 341 *section* 1 (*Comp. St. section* (1676); *U. S. v. Welsh* (*D. C.*) 247 *Fed.* 239."

In the case of *Elrod v. Moss,* 278 *Fed.* 123 (CCA 4) Woods, C. J. lays down the rule that:

> "Under the federal as well as the state statutes, to justify a search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused. BUT IT IS NOT NECESSARY THAT HE SHOULD ACTUALLY SEE THE CONTRABAND LIQUOR. Here the plaintiff had resisted the warrant to search his car for contraband liquor; he had struck the officer from his car to prevent the search, and in flight had thrown a package from his car. We think the jury might well conclude that all this constituted a discovery by Gosnell of the plaintiff in the act of transporting contraband liquor in his automobile, and that Gosnell was justified in making the arrest for interference by plaintiff with the performance of his official duty."

In the case of *Lambert v. U. S.* 282 *Fed.* 413 (CCA 9) this court lays down the rule that:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense."

The search of this appellant's place of business, with or without warrant, under the circumstances as disclosed by the evidence in this case, would have been lawful under the National Prohibition Act. It was lawful under the Alaska Bone Dry Act also.

According to the authority of the foregoing decisions, the search and seizure in this case was lawful and must be upheld.

CONCLUSION

Counsel for United States of America respectfully maintain:

1. That the District Court properly overruled the demurrer to the complaint—the Alaska Bone Dry Act was not repealed by the National Prohibition Act.

2. That the District Court properly refused to suppress evidence obtained on the search warrant in this case because: (a) the search warrant was valid and lawful; (b) or, if not, the crime being committed in the presence of the officer in a public place, no search warrant was necessary.

Therefore, the conviction must be sustained.

Respectfully submitted,

ARTHUR G. SHOUP,
U. S. Attorney.

HOWARD D. STABLER,
Special Assistant U. S. Attorney.